

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

DISH NETWORK L.L.C. f/k/a EHOSTAR
SATELLITE L.L.C.,

Plaintiff,

-v-

ESPN, INC., and ESPN CLASSIC, INC.,

Defendants.

:
: Hon. John G. Koeltl
:

:
: No. 09 CIV 6875 (JGK) (FM)
:

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE
TO AMEND THE JOINT PRE-TRIAL ORDER**

SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
(212) 455-2000
Barry R. Ostrager
Mary Kay Vyskocil
Gregory P. Szewczyk

FLEMMING ZULACK WILLIAMSON
ZAUDERER LLP
One Liberty Plaza
New York, New York 10006
(212) 412-9500
Dean R. Nicyper
Lissa C. Gipson
Richard A. Williamson

Attorneys for Plaintiff DISH Network L.L.C.

DISH Network L.L.C. f/k/a EchoStar Satellite L.L.C. ("DISH" or "Plaintiff") respectfully submits this Motion for Leave to Amend the Joint Pre-Trial Order ("Motion") to include Judith Meyka on the Plaintiff's "may call" witness list.

ARGUMENT

By this Motion, DISH requests leave to amend the Joint Pre-Trial Order ("PTO") submitted by the parties on November 19, 2012 to add Judith Meyka to the Plaintiff's "may call" witness list. DISH respectfully submits that there would be absolutely no prejudice whatsoever to the Defendants, who have already rigorously deposed Ms. Meyka but nonetheless unreasonably refused to consent to this modest amendment. DISH informed ESPN on January 2, 2013 via e-mail that DISH had inadvertently omitted Ms. Meyka from the witness list in the PTO. DISH offered to add Ms. Meyka by stipulation of the parties in order to avoid burdening the Court with a motion. Counsel for ESPN responded the same day via e-mail that ESPN would not agree to amend the PTO to add an additional witness.

ESPN would not be prejudiced by the addition of Judith Meyka to the witness list. DISH anticipates that its examination of Ms. Meyka would last no longer than approximately 20 to 30 minutes, and would closely track her expert report and deposition testimony. Ms. Meyka, a highly credentialed custom and practice witness, was the subject of an eight-hour deposition conducted in December 2011 by Theodore Tsekerides, who continues to serve as trial counsel for ESPN. Mr. Tsekerides had the opportunity at that examination to ask Ms. Meyka about the full range of topics on which she could testify at trial. In particular, Mr. Tsekerides examined Ms. Meyka at length about the contents of her 25-page expert report, which was signed 18 months ago and has been in ESPN's possession for more than a year. As Ms. Meyka's report and deposition both show, DISH intends to call Ms. Meyka as an industry expert. She will not be presenting technical knowledge or complex calculations of any kind during her brief but

probative direct examination. Considering ESPN has had more than a year to review Ms. Meyka's deposition and expert report, there is no reason why ESPN cannot be prepared to cross-examine Ms. Meyka at a trial that begins six weeks from now.

By contrast, DISH would be significantly prejudiced were the Court to rule that this inadvertent error cannot be cured. Ms. Meyka's testimony directly corroborates DISH's claims that ESPN violated the terms of agreement between the parties by entering into more favorable agreements with other distributors and failing to offer those same more favorable terms to DISH. Further, Ms. Meyka is the only DISH liability witness who has been able to review certain third-party agreements in unredacted form as ESPN has refused to allow DISH's other witnesses access to these documents. DISH should not be prohibited from presenting its full case to the jury, especially where, as here, ESPN can show no prejudice from the addition of a single witness to the list.

CONCLUSION

For the foregoing reasons, Plaintiff DISH respectfully requests that the Court grant the Motion and grant DISH leave to add Judith Meyka to the witness list in the Joint PTO.

Dated: January 3, 2013
New York, New York

SIMPSON THACHER & BARTLETT LLP

By  /G.P.S.

Barry R. Ostrager
Mary Kay Vyskocil
Gregory P. Szewczyk
425 Lexington Avenue
New York, New York 10017
Tel: (212) 455-2000
Fax: (212) 455-2002

FLEMMING ZULACK WILLIAMSON
ZAUDERER LLP

Dean R. Nicyper
Lissa C. Gipson
Richard A. Williamson
One Liberty Plaza
New York, New York 10006
Tel: (212) 412-9500
Fax: (212) 964-9200

Attorneys for Plaintiff DISH Network L.L.C.